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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO AND FRANK J. VANEK,
Petitioners,

v.

JOHN R. NOVOTNY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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INTEREST OF THE AMICUS CURIAE

This brief of the Equal Employment Advisory Council ("EEAC") as *amicus curiae* in support of the petitioners is submitted with the written consent

of all parties.[1] EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations of EEO policies and requirements. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1985(3), as applied by the Court below, as well as other equal employment statutes and regulations. Most of EEAC's member representatives—many of whom are corporate officers—are charged with corporate responsibility for compliance with the various federal, state and local statutes, regulations and orders dealing with equal employment opportunity. As such, they have a direct interest in the principal issue presented by the instant case—*i.e.*, whether 42 U.S.C. § 1985(3) applies to an alleged conspiracy among the officers and directors of a single corporation to violate Title VII. EEAC previously filed a brief *amicus curiae* in this case supporting the petition for certiorari.

[1] Their consents have been filed with the Clerk of the Court.

Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *amicus curiae* in a number of other recent cases in this Court raising important equal opportunity issues. *See, e.g., Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *County of Los Angeles* v. *Davis*, pending, No. 77-1553; *Kaiser Aluminum & Chemical Corp.* v. *Weber*, pending, No. 78-435; *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); and *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

STATEMENT OF THE CASE

Respondent John R. Novotny brought this suit on December 17, 1976, in the United States District Court for the Western District of Pennsylvania, alleging that petitioner Great American Federal Savings and Loan Association and its officers and directors, the individual petitioners, terminated his employment as an officer of the Association in violation of 42 U.S.C. § 1985(3) and Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Novotny alleged that on or about January 22, 1975, at the Association's annual meeting, the Association and its officers and directors failed to reelect him as an officer and terminated his employment in retaliation for his earlier protest of the Association's alleged discrimination against certain of its female employees.

The Association having moved to dismiss Novotny's complaint, the district court on April 22, 1977, dis-

missed the complaint in its entirety. Pet. App. 76a.[2] In an accompanying opinion, the district court held that a conspiracy under § 1985(3) could not exist because the complaint alleged that only one legal entity, the Association, terminated Novotny. Pet. App. 71a-73a. The court dismissed the Title VII cause of action because in its view § 704(a), the "retaliation" provision, did not protect Novotny's termination in the absence of any allegation that the termination was connected with a Title VII enforcement proceeding. Pet. App. 73a-75a.

The Court of Appeals for the Third Circuit *en banc* reversed the district court on August 7, 1978, with respect to both counts of the complaint. It held that concerted action to deprive an employee of the substantive rights conferred by Title VII could be remedied under § 1985(3), and that the officers and directors of a single corporation acting on its behalf could form a conspiracy covered by § 1985(3). Pet. App. 28a-29a, 36a-40a, 50a-55a. These are the issues on which this Court granted certiorari and are of particular concern to EEAC as *amicus curiae*. The Court of Appeals also reinstated Novotny's claim under § 704(a), and no review of that determination has been sought. Pet. App. 56a-61a.

SUMMARY OF ARGUMENT

I.

The Third Circuit's determination that 42 U.S.C. § 1985(3) provides a remedy for conspiratorial inferences with an employee's Title VII rights is based on an expansive misreading of the statute and its

[2] "Pet. App." refers to the appendix of the Petition for Certiorari filed in this case.

legislative history.[3] The decision below, if sustained by this Court, will lead to the application of § 1985(3) to a host of federal statutory rights for which Congress provided specific remedial schemes exclusive of § 1985(3). It will also seriously undermine the careful administrative/judicial balance Congress adopted for redressing violations of Title VII of the Civil Rights Act of 1964.

Section 1985(3) is the current codification of § 2 of the Ku Klux Klan Act of 1871, a statute aimed

[3] 42 U.S.C. § 1985(3) provides as follows:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

at providing a federal forum to protect citizens from the violence of the Ku Klux Klan. In the years immediately after the Civil War, protection of federal constitutional rights—particularly those created by the Thirteenth and Fourteenth Amendments—had broken down in the Southern states. Since the state courts were then the primary forum for the protection of federal rights, Congress created in the Ku Klux Klan Act a limited federal forum not otherwise available for redress of certain federal rights. Its aim was not to create parallel remedies where an effective remedy—particularly in a federal court —was already available.

The plaintiff in this case, Novotny, has available to him an effective federal court remedy provided by § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a). Title VII creates both administrative and judicial remedies aimed first at promoting voluntary compliance with Title VII via administrative conciliation, and then, if conciliation fails, at securing the most complete relief possible via federal court litigation. Its "careful blend of administrative and judicial enforcement powers" provides the exclusive means for redressing violations of the statute. *See Brown* v. *GSA*, 425 U.S. 820, 833 (1976). Although, to be sure, Congress contemplated that Title VII would not supplant pre-existing statutory prohibitions against employment discrimination, there is nothing in the legislative history of Title VII indicating that Congress intended that remedies outside of the Title VII scheme would apply to discrimination claims based on Title VII.

II.

Section 1985(3) would not, in any event, be applicable to this case because the complaint does not establish the existence of "two or more persons," the essential ingredient of a conspiracy. *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971). The only individuals claimed to have engaged in a conspiracy in this case are the officers and directors of the Association, all of whom, according to the complaint, "were and are acting on behalf of" the Association. Pet. App. 83a. Under long-settled and widely followed principles of civil conspiracy law, the officers and directors of a single corporation acting on its behalf are the corporation's agents, and together with the corporation constitute a single legal personality. To find a conspiracy in such a circumstance would amount to holding that the corporation conspired with itself. This is contrary to principles long adhered to in various civil law contexts, including cases in the antitrust, contracts and civil rights fields. Except for the Third Circuit, every Court of Appeals follows the traditional rule and it should not now be overturned.

ARGUMENT

I. SECTION 2 OF THE KU KLUX KLAN ACT OF 1871 IS NOT AN ALTERNATIVE MECHANISM FOR ENFORCING RIGHTS CREATED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

In *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), this Court resurrected the long dormant Section 2 of the Ku Klux Klan Act of 1871 (Act of April 20, 1871, ch. 22, 17 Stat. 13), now codified as 42 U.S.C. § 1985(3). The case involved four black individuals who were traveling along the highways of Kemper County, Mississippi. Two local white residents mistook the driver of the car of black men for a civil rights worker and blocked the car on the highway. The occupants were forced out, held at bay with firearms, threatened with murder, and then beaten with "deadly blackjacks, pipes or other kinds of clubs." *Id.* at 90-92. The facts of *Griffin* would fit without alteration in the list of outrages described by the Members of the 42d Congress that enacted the Ku Klux Klan Act:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice.

CONG. GLOBE, 42d Cong., 1st Sess., App. 374 (1871), *quoted in Monroe* v. *Pape*, 365 U.S. 167, 175 (1961).

Mr. Justice Stewart, writing for the Court in *Griffin*, appropriately characterized the facts as "so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." *Griffin, supra*, 403 U.S. at 103. But he also made clear that § 1985(3) is limited in scope, and is aimed only at conspiracies in which there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . ." *Id.* at 101-02. The Court declined to decide whether § 1985(3) extends beyond a racially motivated discriminatory intent (*id.* at 102 n.9), but warned of the "constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law . . . ." *Id.* at 102.

The present case, involving an alleged retaliatory discharge of a white male bank employee, is a far cry from *Griffin* and the concerns of the Congressional sponsors of § 1985(3). Novotny's claim involves no highway marauders, no violence or terror, no racial discrimination, and no interference with a constitutional right to be free of discrimination. If Novotny's dismissal from his job were to be held unlawful, it would only be if the facts established a violation of § 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), which makes it unlawful to retaliate against an employee because he has opposed a practice forbidden by Title VII. However reprehensible one may regard such conduct, such a dismissal by a private employer was not unlawful prior to the enactment of Title VII in 1964. *See, e.g., Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090-91 (5th Cir. 1975) (en banc); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); Note, *Developments in the Law—Employment Discrimination and Title*

VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1167 (1971).

The Court of Appeals held that Novotny's allegations, if proved, would constitute a violation of § 704 (a) (Pet. App. 59a-60a), and that holding has not been challenged in this Court. It is therefore clear that Novotny will have a chance to prove his claim, and if he is successful, will be eligible for all the relief provided by Title VII. The sole issue here is whether he should receive additional relief, such as compensatory or punitive damages against the individual defendants, under 42 U.S.C. § 1985(3).

As we shall show below, the Ku Klux Klan Act was never intended to provide an additional or supplemental remedy for violations of federal rights for which other specific remedies are provided by federal law. *See* pp. 10-14 *infra*. If it were now to be so construed, it would indeed be converted into "a general federal tort law." *Griffin*, *supra*, 403 U.S. at 102. Moreover, as we shall also show, the language and legislative history of Title VII make clear that its remedies were intended to be the exclusive means for redressing Title VII violations. *See* pp. 15-23 *infra*. To grant Novotny a cause of action under 42 U.S.C. § 1985(3) for what is nothing more than a violation of Title VII would fly in the face of that clear Congressional intent.

A. Section 1985(3) Has No Application to Federal Statutory Rights For Which Congress Has Provided a Self-Contained Enforcement Scheme.

Although the Third Circuit purported to hold that § 1985(3) applies only to the "deprivation of a right secured by a federal statute guaranteeing equal employment opportunity" (Pet. App. 28a), the opinion

contains no basis for defining those federal statutory rights reached by § 1985(3) and those outside its ambit. Under the court's rationale, virtually any right created by federal statute, particularly those enacted under the Commerce Clause like Title VII, could be enforced by § 1985(3).[4] This anomalous result could only be reached, we believe, by failing to place § 1985(3) in its historical context. *See District of Columbia* v. *Carter*, 409 U.S. 418, 420 (1973); *cf. Boys Market, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250 (1970).

In this modern age when federal rights are routinely enforced in a federal judicial forum, it is easy to overlook the revolutionary nature of the step Congress took in 1871 when it enacted the Ku Klux Klan Act. *See Monroe* v. *Pape*, *supra*, 365 U.S. at 252-53 (Frankfurter, J., dissenting). At that time, there was no federal question jurisdiction in the federal

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[4] The deprivation of a wide assortment of statutory rights, including several based on Congress' Commerce Clause power, has already been held to state a cause of action under § 1985 (3) and indicates the potentially unlimited reach of the statute under the Third Circuit's interpretation. *See, e.g.*, Hodgin v. Jefferson, 447 F. Supp. 804, 808 (D. Md. 1978) (violation of Federal Equal Pay Act states claim under § 1985(3)); Local No. 1(ACA) v. Int'l Bhd. of Teamsters, 419 F. Supp. 263, 276 (E.D. Pa. 1976) (violation of Labor-Management Reporting and Disclosure Act states claim under § 1985(3)); Murphy v. Operating Engineers, Local 18, —— F. Supp. ——, 99 L.R.R.M. 2074, 2126 (N.D. Ohio 1978) (violation of Labor-Management Reporting and Disclosure Act states § 1985(3) claim). We believe these cases, like the decision below, to have been wrongly decided.

courts.[5] Federal rights, whether constitutional or statutory, were enforceable only in state courts subject to appellate review by the Supreme Court of the United States. *See id.* at 252. State enforcement of the rights created by the newly ratified post-Civil War Constitutional amendments, however, had broken down due largely to violent resistance by the Ku Klux Klan. *See Monroe* v. *Pape*, *supra*, 365 U.S. at 172-73, *quoting* Message of President Grant, CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871); *see also id.* at 174-81. In direct response, Congress in 1871 created a federal forum to secure the Fourteenth Amendment rights against hostile or ambivalent state officials or non-official marauders. *See District of Columbia* v. *Carter*, *supra*, 409 U.S. at 423, 427-29 (1973); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 545 (1972); *Monroe* v. *Pape*, *supra*, 365 U.S. at 171. Section 1 of the 1871 Ku Klux Klan Act, now 42 U.S.C. § 1983, was directed at constitutional deprivations caused by official state action or neglect by state officials. *See* CONG. GLOBE, 42d Cong., 1st Sess., App. 85, 153 (1871), *quoted in Monell* v. *Department of Social Services*, 436 U.S. 658, 685-86 n.45 (1978). Section 2, the precursor of 42 U.S.C. § 1985 (3), was aimed at private conspiracies—particularly the Ku Klux Klan[6]—that interfered with or prevented state officials from carrying out their duties in enforcing the federal right to equal protection

[5] Federal question jurisdiction was first conferred on the federal courts by the Act of March 3, 1875, § 1, 18 Stat. 470 (1875). *See* 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 3561, at 389 (1975); District of Columbia v. Carter, 409 U.S. 418, 427 n.20 (1973).

[6] *See* Monell v. Dep't of Social Services, 436 U.S. 658, 665 & n.11 (1978).

of the law.[7] Thus, with the enactment of the 1871 Ku Klux Klan Act, Congress sought to provide a federal forum not otherwise available for redress of federal rights.

When this Court in *Griffin* revitalized § 1985(3) one hundred years after its enactment, it did so in a case where the protection of the victimized black individuals would otherwise be dependent on the state's judicial system. Indeed, there is little to distinguish the Mississippi highway marauders described in *Griffin* from the Klan whose activities a century before inspired the precursor of § 1985(3). In contrast, the plaintiff Novotny is far from dependent on § 1985(3) for a federal forum. He may have a

[7] This point is illustrated by the remarks of Representative Poland during the debate on § 1985(3)'s ancestor:

> . . . if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States.

CONG. GLOBE, 42d Cong., 1st Sess. 514 (1871), *quoted in* Monroe v. Pape, 365 U.S. 167, 201 n.10 (1961) (Harlan, J., concurring).

viable claim under § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), recognized as such by the Third Circuit (Pet. App. 59a-60a) and unchallenged here. Novotny is eligible for relief in a federal court under a comprehensive federal remedial scheme. If he proves his allegations on remand, he would, like all other Title VII plaintiffs, be made "whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); *see also International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 367 (1977).

The aim of the 42d Congress in enacting the Ku Klux Klan Act was to provide one reliable forum to protect federal rights, and not simply to create parallel federal remedies where an adequate federal remedy is already available. "[T]he dominant jurisdictional thought of the day," as Mr. Justice Frankfurter has pointed out, was "that redress in a federal trial court was . . . to be very sparingly afforded." *Monroe* v. *Pape*, *supra*, 365 U.S. at 253 (dissenting opinion). The Third Circuit's expansion of § 1985(3) to create a federal remedy paralleling an effective federal remedy already in existence thus is inconsistent with § 1985(3)'s limited aim of protecting otherwise unprotected federal rights.[8]

[8] Since § 1985(3) rarely, if ever, will be coextensive with the federal remedy enacted as part of a substantive statutory scheme, § 1985(3), if construed as providing a parallel remedy to other federal relief, is likely to undermine the Congressional judgment as to particular forms of relief or types of enforcement mechanisms intended to protect a particular federal statutory right. Thus, as the Third Circuit acknowledged, § 1985(3) may provide under those circumstances a private remedy where Congress, as part of the substantive statute, deliberately withheld creating a private right of action as the vehicle for enforcing the federal right. Pet. App. 28a. *Compare* Fair Labor Standards Act § 16(b), *as amended*, 29 U.S.C. § 216(b) (private right to sue under Fair Labor Standards Act and Equal Pay Act terminates upon filing of complaint by Secretary of Labor) *with* Hodgin v. Jefferson, *supra* note 4, 447 F.Supp. at 808 (§ 1985(3) provides alternative remedy for violation of Equal Pay Act). *See also* note 20 *infra*.

B. Title VII Establishes an Exclusive Comprehensive Scheme for Enforcing the Rights Created by That Title.

In concluding that Title VII rights could be enforced through 42 U.S.C. § 1985(3), the Court of Appeals gave scant attention to the remedies provided by Title VII itself. It spoke broadly about sex discrimination and "equal privileges and immunities under the laws" (Pet. App. 16a-18a, 29a-36a), but completely overlooked this Court's recent decision in *Brown* v. *GSA*, 425 U.S. 820 (1976), which strongly implied that the remedial scheme of Title VII was the exclusive means for redressing Title VII violations.[9] *Id.* at 829.

In *Brown*, the Court analyzed § 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, the component of Title VII addressed to the rights and remedies of federal employees. Its conclusion was that the "balance, completeness and structural integrity" of § 717 independently com-

[9] As we explain more fully at a later point, we distinguish between remedies for violations of Title VII and remedies for violations of other statutes. The limitation upon Title VII remedies applies only to Title VII rights; preexisting substantive rights under other statutes are not supplanted by Title VII. *See* pp. 21-23 *infra*.

pelled the holding that Title VII should be the exclusive method by which federal employees may secure redress from employment discrimination. *Id.* at 832. Had the Third Circuit applied the *Brown* method of analysis to the problem of the private employee in the case before it, the court logically would also have had to conclude that remedies for violations of rights created by Title VII are limited to those contained in Title VII itself.[10]

Like § 717, the hallmark of Title VII's remedial scheme for employees in the private sector is "a careful blend of administrative and judicial enforcement powers." *Id.* at 833. Under § 717, a federal employee first seeks administrative relief from his employing agency and then may seek review from the Civil Service Commission. An aggrieved federal employee must exhaust administrative procedures before being eligible to file suit in federal court. *Id.* at 831-32. Under Title VII, an aggrieved private employee similarly may seek relief from employment discrimination by filing an informal complaint with the Equal Employment Opportunity Commission. § 706(b), *as amended*, 42 U.S.C. § 2000e-5(b). The Commission, with state and local equal employment agencies, is given broad authority to investigate and

[10] This Court employed a similar analysis to achieve a similar result earlier this Term in Int'l Bhd. of Teamsters v. Daniel, —— U.S. ——, 99 S.Ct. 790, 801-02 (1979). The Court there concluded that the specific and comprehensive provisions of the Employee Retirement Income Security Act of 1974 govern employee pension plans to the exclusion of the more generally directed Securities Act and Securities and Exchange Act. *See also* Califano v. Sanders, 430 U.S. 99, 104-07 (1977); Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973); Johansen v. United States, 343 U.S. 427, 439 (1952).

conciliate the claimed violation of Title VII, termed an "unlawful employment practice." §§ 703(a), 706(b)-(e) *as amended*, 42 U.S.C. §§ 2000e-2(a), 2000e-5(b)-(e); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). If conciliation fails or the statutory time allotted for conciliation has been exhausted, either the Commission or the aggrieved party may then file suit in federal court. § 706(f)(1), *as amended*, 42 U.S.C. 2000e-5(f)(1).[11] The federal court may fashion whatever relief is necessary. § 706(g), *as amended*, 42 U.S.C. § 2000e-5(g). Though not identical in every respect, both § 717 and the provisions of Title VII applicable to private employees thus provide "an integrated, multistep enforcement procedure" [12] for the orderly and full consideration of employment discrimination claims.

Title VII's legislative history, moreover, demonstrates that its detailed administrative/judicial enforcement machinery was carefully designed to balance the competing interests involved in an employment discrimination complaint. *See Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359, 372-73 (1977). Delegation of enforcement authority to the Commission shifts the burden of prosecution from the individual complainant, assures employers that the agency issuing discrimination guidelines will also be the agency enforcing compliance, and encourages the settlement of disputes through informal conciliation

[11] An aggrieved party must also secure a "right to sue letter" from the EEOC before initiating suit. § 706(f)(1), *as amended*, 42 U.S.C. § 2000e-5(f)(1); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

[12] Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359 (1977).

rather than formal judicial proceedings. *See* Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1200, 1270 (1971). Creation of jurisdictional prerequisites to an individual's right to bring suit in a federal court affords the Commission "an opportunity to settle disputes through conference, conciliation, and persuasion," indisputably the "preferred means for achieving [the] goal" of Title VII. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 44. Authorization of a private right of action, however, allows the individual to escape the administrative machinery if it is not working.[13] *Oc-*

[13] In a section-by-section analysis of the 1972 amendments to Title VII, Senator Williams, the floor manager of the bill, explained:

> In providing this remedy, it is intended that recourse to this form of remedy will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC. However, as the individual's rights to redress are paramount under the provisions of Title VII, it is necessary that all avenues of relief be left open for quick and effective relief.
>
> In providing for the individual right to sue in the event that action by the Commission is unsatisfactory or unresponsive, it is not intended that duplication of proceedings should be allowed. Therefore, in any proceeding where the General Counsel or the Attorney General, as the case may be, is proceeding with due diligence within the time limits specified in this subsection, the person aggrieved would be precluded from instituting an individual action until such time as one of the specific conditions of this subsection are not met.

SENATE COMM. ON LABOR & PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1772 (1972) (hereinafter 1972 LEGISLATIVE HISTORY).

cidental Life Insurance Co. v. *EEOC*, *supra*, 432 U.S. at 362-66. Ultimate resort to the federal courts also delegates the task of investigation and fact-finding to the agency that has the specialized knowledge and resources to do so, while insuring that the private claimant will receive the most complete relief possible. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 76, 64 (1973); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 881 (1972).

Allowing a Title VII claimant immediate access to the courts under § 1985(3) would circumvent this "careful and thorough remedial scheme." *Brown* v. *GSA*, *supra*, 425 U.S. at 833; *cf. Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973). By pleading a conspiracy to violate Title VII and invoking § 1985(3), a claimant can avoid Title VII's limitations on filing time,[14] back pay,[15] jury trial,[16] and punitive damages.[17]

[14] *Compare* United Air Lines, Inc. v. Evans, 431 U.S. 553, 555 (1977) (Title VII charge must be filed with EEOC within 90 days), *with* Davis v. United States Steel Supply, 581 F.2d 335, 337 (3d Cir. 1978) (state law determines statute of limitations for actions under Civil Rights Acts).

[15] *See* § 706(g), 42 U.S.C. § 2000e-5(g) (Title VII's two year limit on back pay).

[16] *Compare* Cameron v. Brock, 473 F.2d 608, 609 (6th Cir. 1973) (jury trial in § 1985(3) action) *with*, *e.g.*, Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975) (no jury trial provided in Title VII suits, joining Fourth, Fifth, and Sixth Circuits); Lorillard v. Pons, 434 U.S. 575, 583-85 (1978) (emphasizes equitable nature of Title VII suit although not deciding jury trial issue).

[17] *See* Richerson v. Jones, 551 F.2d 918, 926 (3d Cir. 1977) (punitive damages may not be recovered under Equal Employment Opportunity Act of 1972).

Yet each of these provisions, no less than Title VII's blend of forums, reflects a deliberate choice made by Congress in 1964 and 1972.[18] A § 1985(3) plaintiff might also plan to circumvent the EEOC's notorious backlog of cases.[19] In so doing, however, the "crucial administrative role" of the EEOC (*cf. Brown* v. *GSA*, *supra*, 425 U.S. at 833) is clearly undermined. Congress was well aware of the EEOC's backlog in 1972, yet it reinforced the Commission's conciliation role

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[18] The backpay formula, for example, limits recovery to two years prior to the time a charge is filed with the Commission. § 706(g), *as amended*, 42 U.S.C. § 2000e-5(g). The two year limit protects employers from liability extending back to the effective date of the 1964 Act, while the calculation date from filing a Commission charge, rather than from filing a court action, prevents an employee from being penalized for filing with the Commission. The compromise that created this formula is discussed in Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 881-82 (1972).

[19] *See* Occidental Life Insurance Co. v. EEOC, *supra* note 12, 432 U.S. at 369. According to the EEOC's Vice Chairman, Daniel Leach, the Commission's 1977 backlog in three model offices alone amounted to 10,300 cases. Leach, *Title VII of the Civil Rights Act and the EEOC: An Agency in the Midst of Change*, 29 MERCER L. REV. 661, 669 n.36 (1978). This problem is being alleviated by the institution of the Commission's new streamlined procedures that has resulted in an 11% reduction in backlog of three model offices within 14 weeks. *Id.* at 669 n.36. In view of the geometric increase in the number of private civil rights cases filed in federal district courts over recent years, and the potential litigation that could follow the Third Circuit's decision, the backlog of the district courts could exceed that of the EEOC's. *See* FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 16, 17, 75 & n.4 (1973).

with substantial additional enforcement powers.[20] *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 369-70; *see 1971-1972 Annual Survey of Labor Relations Law*, 13 B.C. INDUS. & COM. L. REV. 1347, 1366-67 (1972). The threat to Title VII's remedial scheme implicit in sanctioning independent enforcement of Title VII rights led the Fourth Circuit to reject the position embraced here by the Third. *See Doski* v. *M. Goldseker Co.*, 539 F.2d 1326, 1334 (4th Cir. 1976). The Third Circuit's position, antithetical to this Court's holding in *Brown* v. *GSA*, now merits rejection by this Court.

A holding that enforcement of Title VII rights is limited to the remedies found in Title VII would not conflict with the clear Congressional intent that other protections against employment discrimination were not to be supplanted by enactment of Title VII. *See Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48-49; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976). The same conduct may violate an employee's rights under Title VII, under 42 U.S.C. § 1981, and under a collective bargaining agreement. In that case, the employee's claim stems from three independent sources of federal substantive law, each of which contemplates its own remedies without exclusion of the others. *See Alexander* v. *Gardner-*

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[20] While the pendency of EEOC-initiated Title VII litigation on behalf of an aggrieved individual is intended to preclude a parallel Title VII suit by that individual (*see* note 13 *supra*), the individual could circumvent that limitation if dissatisfied with the progress of the litigation by initiating a separate § 1985(3) suit, perhaps even in another district court.

Denver Co., supra, 415 U.S. at 49-50; *Johnson* v. *Railway Express Agency, supra*, 421 U.S. at 459; *International Union of Electrical Workers* v. *Robbins & Myers, Inc., supra*. Before a statute other than Title VII can be used to remedy claims also arising under Title VII, a right with an independent statutory source must be found. Section 1985(3) is not such a statute since it creates no substantive rights; it is purely remedial in that it enforces rights created somewhere else.[21] It does not, in itself prohibit private employment discrimination, or retaliation against employees who opposed such discrimination.

Accordingly, Novotny would have no possible claim under § 1985(3) were it not for the fact that Title VII prohibits discrimination in employment based on sex, and protects employees who oppose such discrimination against retaliatory action by their employers. *See Doski* v. *Goldseker Co., supra*, 539 F.2d at 1334. However Title VII not only creates these rights and protections, but also provides a comprehensive "unitary" remedial scheme for their enforcement.[22] The exclusivity of such a remedial scheme for Title VII rights is not inconsistent with the preservation of other pre-1964 substantive statutes aimed at eliminating employment discrimination.

[21] *See* Pet. App. 26a-27a; Cohen v. Illinois Inst. of Technology, 524 F.2d 818, 828 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (Stevens, J.); Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 507 (4th Cir. 1974); McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 927 (5th Cir. 1977) (en banc), Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 GEO. WASH. L. REV. 239, 245-51 (1977); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 498 (1974). *Contra*, Action v. Gannon, 450 F.2d 1227, 1235 (8th Cir. 1971) (en banc); Comment, *Private Conspiracies to Violate Civil Rights: McLellan v. Mississippi Power & Light Co.*, 90 HARV. L. REV. 1721, 1724-27 (1977).

The fact that the plaintiff, Novotny, would not have had a § 1985(3) claim prior to 1964 also refutes the Court of Appeals' argument that "if rights protected by Title VII are to be excluded from the scope of § 1985(3), such result must flow from the fact that Title VII worked a partial repeal of § 1985(3) . . . ." Pet. App. 38a. The issue is not one of repeal of § 1985(3), but one of its applicability to a comprehensive remedial scheme established to enforce subsequently enacted federal rights.

II. THE ALLEGATION OF A CONSPIRACY AMONG THE OFFICERS AND DIRECTORS OF A SINGLE CORPORATION ACTING ON BEHALF OF THE CORPORATION DOES NOT SATISFY THE "TWO OR MORE PERSONS" ELEMENT OF 42 U.S.C. § 1985(3).

The Third Circuit's holding that Title VII rights may be redressed under 42 U.S.C. § 1985(3) was premised on its equally novel conclusion that a corporation and its officers and directors, acting within the scope of their employment, constitute more than one person for the purpose of counting conspirators in a civil action. Pet. App. 50a-55a. In so concluding, the Third Circuit flouted a fundamental principle of corporate law: that when several individuals are "consolidated and united into a corporation, they and their successors are then considered as one person in

[22] *See* 1972 LEGISLATIVE HISTORY, *supra* note 13, at 1512 (remarks of Senator Javits).

law . . . ." 2 BLACKSTONE, COMMENTARIES ch. 18, at 468 (Tucker ed. 1803); *see Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). The concept that the individuals who compose a corporation constitute but a single legal person has, accordingly, been recognized by every circuit but the Third as precluding a finding of conspiracy when the only actors are a corporation's officers and directors.[23]

The common rationale in these and similar civil conspiracy cases, whether arising under § 1985(3),[24]

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[23] *See, e.g.*, Walker v. Providence Journal Co., 493 F.2d 82, 87 (1st Cir. 1974); Girard v. 94th St. and Fifth Ave. Corp., 530 F.2d 66, 70-71 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); Fallis v. Dunbar, 532 F.2d 1061 (6th Cir. 1976) (per curiam); Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972) (Stevens, J.); Baker v. Stuart Broadcasting Co., 505 F.2d 181, 183 (8th Cir. 1974); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 82-83 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Zelinger v. Uvalde Rock Asphalt Co., 316 F.2d 47, 52 (10th Cir. 1963); Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962).

[24] *See, e.g.*, Girard v. 94th St. & Fifth Ave. Corp., *supra* note 23, 530 F.2d at 70-71; Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974) (Boreman, J., concurring); Chambliss v. Foote, 421 F. Supp. 12, 15 (E.D. La. 1976), *aff'd per curiam*, 562 F.2d 1015 (5th Cir. 1977), *cert. denied*, 439 U.S. ——, 99 S. Ct. 127 (1978); Jones v. Tennessee Eastman Co., 397 F. Supp. 815, 816 (E.D. Tenn. 1974), *aff'd mem.*, 519 F.2d 1402 (6th Cir. 1975); Dombrowski v. Dowling, *supra* note 23, 459 F.2d at 196; Baker v. Stuart Broadcasting, *supra* note 23, 505 F.2d at 183. *Accord*, Comment, *Private Conspiracies to Violate Civil Rights: McLellan v. Mississippi Power & Light Co.*, 90 HARV. L. REV. 1721, 1723 n.15 (1977).

§ 1 of the Sherman Act,[25] or other contexts,[26] is that because a corporation can act only through its officers

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[25] *See, e.g.*, Walker v. Providence Journal Co., *supra* note 23, 493 F.2d at 87; Person v. N.Y. Post Corp., 427 F. Supp. 1297, 1307 (E.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); Greenville Publishing Co. v. Daily Reflector, Inc., *supra* note 23, 496 F.2d at 399; H.&B. Equip. Co. v. Int'l Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Tamaron Distrib. Corp. v. Weiner, 418 F.2d 137, 139 (7th Cir. 1969); Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 916-17 (8th Cir. 1976); Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., *supra* note 23, 416 F.2d at 82-83; Poller v. Columbia Broadcasting System, Inc., *supra* note 23, 284 F.2d at 603.

The Fifth Circuit's decision in Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), is frequently cited as the fountainhead of this rule not just for Sherman Act § 1 cases but for other civil conspiracies. Pet. App. 52a n.117. But the fact is that cases antedating *Nelson Radio* adhered to the rule. *See* Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824, 829-30 (D. Md. 1937); Neumann v. Bastian-Blessing Co., 70 F. Supp. 447, 449-50 (N.D. Ill. 1947). The Third Circuit initially followed *Nelson Radio* in Goldlawr, Inc. v. Shubert, 276 F.2d 614, 617 (3d Cir. 1960), but then declined to approve or disapprove it in Johnston v. Baker, 445 F.2d 424, 427 (3d Cir. 1971), and rejected it in the instant case. Most commentators, however, approve the *Nelson Radio* rule. *See, e.g.*, Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. REV. 20, 24 n.15 (1968).

[26] *See, e.g.*, Dorsey v. Chesapeake & O. Ry., 476 F.2d 243, 245-46 (4th Cir. 1973) (per curiam); Pearson v. Youngs-

and directors—in effect, its agents—a conspiracy between the corporation and its officials is tantamount to the corporation conspiring with itself.[27] Only the Third Circuit has chosen to depart from this well-settled principle of civil conspiracy law.

To support its holding, the Court of Appeals argued that counting corporate officers and directors as separate persons in a conspiracy action is necessary to avoid immunizing their wrongful conduct. Pet. App. 51a. In particular, the court hypothesized that individuals agreeing to harass blacks who register to vote could escape liability under § 1985(3) simply by incorporating. *Id.* at 51a-52a. To reach this type of conduct, however, it is necessary only to apply and not to discard the traditional rule of civil conspiracy. As pointed out by Judge (now Mr. Justice) Stevens in his *Dombrowski* opinion:

> Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon.

Dombrowski v. *Dowling*, *supra*, 459 F.2d at 196. That is because when a corporation is a mere instrumentality formed to achieve a forbidden result, lower federal courts have recognized an exception to the traditional rule. *See, e.g., Cole* v. *University of Hartford*, 391 F. Supp. 888, 893 & n.9 (D. Conn. 1975); *Beacon Fruit & Produce Co.* v. *H. Harris & Co.*, 152 F. Supp. 702, 704 (D. Mass. 1957). A second exception arises when the acting officers and directors have an independent personal stake in the object of the conspiracy. *See, e.g., Johnston* v. *Baker*, 445 F.2d 424, 427 (3d Cir. 1971); *Greenville Publishing Co.* v. *Daily Reflector, Inc.*, *supra*, 496 F.2d at 399 & n. 16; *H.&B. Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978). The type of situation feared by the Third Circuit, consequently, would not "immunize" its wrongful actors. On the contrary, individuals who incorporate to escape liability for harassing black voters would quickly find their corporation "pierced" and themselves held individually liable as co-conspirators. Thus, the Third Circuit un-

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town Sheet & Tube Co., 332 F.2d 439, 442 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964); Zelinger v. Uvalde Rock Asphalt Co., *supra* note 23, 316 F.2d at 52.

[27] In reaching its decision, the Court of Appeals disclaimed any need to pass on the question of whether "a corporation cannot conspire with itself." Pet. App. 52a. The court took this position by construing the § 1985(3) claim in Novotny's complaint as directed against only the individual defendants, not the corporation. *Ibid.* In our view, this is a myopic way of looking at this case. Although the complaint does not specifically name the corporation as a co-conspirator, the essence of Novotny's § 1985(3) claim, as reflected in paragraph 33 of the complaint, is that the corporation, through the action of its board of directors and officers, terminated Novotny's employment. Pet. App. 83a. Furthermore, the rule of conspiracy law to be applied is the same whether or not the corporation is named. Just as a single corporation cannot conspire with itself, or with its officers and directors, the officers and directors acting on its behalf cannot legally be contemplated as conspiring with each other. *See, e.g.*, Zelinger v. Uvalde Rock Asphalt Co., *supra* note 23, 316 F.2d at 52; Poller v. Columbia Broadcasting System, Inc., *supra* note 23, 284 F.2d at 603; Koehring Co. v. Nat'l Automatic Tool Co., 257 F. Supp. 282, 290 n.6 (S.D. Ind. 1966), *aff'd per curiam*, 385 F.2d 414 (7th Cir. 1967).

necessarily rejected the traditional rule of civil conspiracy.[28]

[28] In support of its decision, the court below relied exclusively on criminal conspiracy cases that follow a different rule from that applied in civil conspiracy cases. Pet. App. 53a-55a. It ignored the fact that this difference stems from the different jurisprudential functions served by criminal and civil conspiracy remedies.

The court also suggested that the traditional civil rule was inapplicable when the claim alleged a continuing policy, rather than an isolated act of discrimination. Pet. App. 55a n.125. In so holding, the Third Circuit relied on dictum in *Dombrowski* which it believed limited the traditional rule to "a single act of discrimination by a single business entity . . . ." 459 F.2d at 196. *Dombrowski* involved only a single isolated instance of discrimination and hence did not hold that a conspiracy would have been established if the plaintiff in that case had alleged multiple discriminatory acts instead of the single act actually alleged. The Second Circuit has declined to find a conspiracy where multiple acts by a corporation's office and directors amount to a single policy of discrimination. *See* Girard v. 94th St. & Fifth Ave. Corp., *supra* note 23, 530 F.2d at 71. Only District Courts within Pennsylvania have adhered to the notion that concerted action by corporate officers and directors, acting within their authority, constitutes a conspiracy when multiple, but not single, acts of discrimination are alleged. *See, e.g.*, Rackin v. Univ. of Pa., 386 F. Supp. 992, 1005-06 (E.D. Pa. 1974); Dupree v. Hertz Corp., 419 F. Supp. 764, 766 (E.D. Pa. 1976); Jackson v. Univ. of Pittsburgh, 405 F. Supp. 607, 612-13 (W.D. Pa. 1975). *But see* Johnson v. Univ. of Pittsburgh, 435 F. Supp. 1328, 1370 (W.D. Pa. 1977).

We submit that the existence *vel non* of a conspiracy has nothing to do with the number of acts of discrimination alleged but with the relationship among the actors. *See* Coley v. M&M Mars, Inc., —— F. Supp. ——, 18 FEP Cas. 1809, 1811 (M.D. Ga. 1978). One recent district court decision rejected the distinction based on the number of discriminatory

The implications of the Third Circuit's conspiracy decision are far-reaching and transcend the civil rights field. Because a corporation can act only through its officers and directors, the effect of the court's decision is automatically to transform all corporate violations of Title VII into violations of § 1985 (3). In view of the fact that all but a handful of Title VII cases involve corporate employers, the impact of the Third Circuit's conspiracy holding, if permitted to stand, will be radically to expand the scope and complexity of virtually every Title VII case. Certainly, there is nothing peculiar to Title VII, which is aimed primarily at the business entity that discriminates rather than at individual third parties,[29] to justify so vastly expanded a theory of liability. *Cf. Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975). It therefore follows that if concerted action by corporate officers and directors acting on behalf of the corporation satisfies

acts alleged for essentially this reason, but then adopted the equally untenable position that all acts of discrimination by corporate management are, in a sense, *ultra vires* unless it affirmatively can be shown that the discrimination was explicitly authorized by the corporation. Scott v. Bd. of Educ., —— F. Supp. ——, 18 FEP Cas. 1230, 1237 (D. Md. 1977). That theory and its implications have been widely discredited in other contexts. *See, e.g.*, New York Cent. & H.R.R.R. v. United States, 212 U.S. 481, 493-94 (1909); Egan v. United States, 137 F.2d 369, 379 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Plainly, the corporate officers here were authorized to adopt personnel hiring and firing policy, and if in doing so they stumbled into a violation of Title VII, their act was no less an authorized one than any other employee dismissal.

[29] *See* 1972 LEGISLATIVE HISTORY, *supra* note 13, at 1512.

the "two or more persons" required of § 1985(3), the rule is jeopardized in its antitrust and corporate law contexts as well.

CONCLUSION

The judgment of the Court of Appeals for the Third Circuit, insofar as it set aside the dismissal of respondent's claim under 42 U.S.C. § 1985(3), should be reversed.

Respectfully submitted,

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